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No. 80-1769

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

WESTINGHOUSE BROADCASTING COMPANY,

Appellant,

v.

COMMISSIONER OF REVENUE

Appellee

On Appeal From The Supreme Judicial Court
For The Commonwealth of Massachusetts

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Should this Court decide a constitutional issue that the Massachusetts Supreme Judicial Court held it was unable to decide in view of the state of the record before that Court?

2. Is a state prohibited from distinguishing between manufacturing and non-manufacturing corporations for purposes of its general corporate excise tax solely because one incidental consequence of that choice is to tax newspaper publishers differently from radio and television stations?

STATEMENT OF THE CASE

Prior Proceedings

The appellant, Westinghouse Broadcasting Company, Inc. ("Westinghouse"), sought to be classified as a "foreign manufacturing corporation" since under Massachusetts law a grant of such status would shift a portion of its property from local to state taxation and would lower its overall rate of taxation. Its initial request to the State Tax Commission, the predecessor of the

Commissioner of Revenue, the appellee herein (the "Commissioner") was rejected and it filed an appeal with the Massachusetts Appellate Tax Board, an independent administrative adjudicatory body. Appendix to the Jurisdictional Statement at 1 ("A.1"). That Board heard Westinghouse's appeal on the basis of a joint stipulation of facts and "brief additional evidence." A.2. The Board upheld the Commissioner's decision. Westinghouse then took an appeal directly to the Massachusetts Supreme Judicial Court. A.1. That court also denied Westinghouse's appeal. Westinghouse Broadcasting Co. v. Commissioner of Revenue, Mass. Adv. Sh. (1981) 183, 417 N.E. 2d 191. It devoted the bulk of its opinion to analysis and rejection of Westinghouse's claim that under Massachusetts law its activities as a radio and

television broadcasting company were such as to require the Commissioner to grant it "manufacturing status." A. 2-5. The court noted that courts in Pennsylvania, Kentucky, and Arizona had previously rejected attempts by broadcasters to obtain preferential tax treatment as manufacturers. A.5. The court noted Westinghouse's attempt to make a constitutional argument based on the fact that two companies that publish newspapers in the Boston were classified as manufacturing corporations, A.6, but it held that it was "unable on the present record to make a judgment" on that claim because the entire business of those other corporations was not presented in any detail. Id. This appeal followed. A. 13.

Statement of Facts

The underlying facts in this case are not in dispute. They are drawn from the joint stipulation filed with the Appellate Tax Board and from the "brief additional evidence" presented by Westinghouse to that Board. A.2. Unfortunately Westinghouse did not include the stipulation in its Jurisdictional Statement, but the opinion of the Supreme Judicial Court (A.2-3) sets out a basic picture of the nature of Westinghouse's business activities.

ARGUMENT

I. THE RECORD IS INADEQUATE FOR THE COURT TO CONSIDER THE QUESTIONS WESTINGHOUSE SEEKS TO RAISE

Westinghouse presents this appeal as a case in which the Commonwealth of

Massachusetts has adopted a taxation scheme designed to discriminate against the broadcast media and in favor of print media and suggests the presence of serious First Amendment questions. Its effort must be rejected at the outset because the thin record below has already been found to be insufficient to resolve the questions which it seeks to raise. A fortiori, the even more limited record Westinghouse brings before this Court is inadequate.

The opinion below shows that the statutory scheme at issue involves a general corporate excise tax which distinguishes between manufacturing and non-manufacturing corporations and gives more favorable treatment to the former. A. 1,7; see Mass. G.L. c.63, §42B. Every corporation doing business in the Commonwealth must pay a corporate excise and

for each one the Commissioner must determine whether its particular activities fall within the "matrix of intention and expectation" which defines the legislative understanding of the term "manufacturing." A.5. The record here shows the nature of Westinghouse's broadcasting activities. And that record is fully adequate to demonstrate the rationality of the decision below that those activities are not "manufacturing".

Westinghouse seeks to avoid this result by shifting the focus from its activities to those of other corporations not before this Court or the court or Board below. It alleges that there are companies which publish newspapers which the Commissioner classifies as manufacturers and it contends that denying it such treatment somehow implicates First

Amendment rights. However, the court below, which had the full record before it, saw matters as being less clear. It held that that record was insufficient for it to pass on Westinghouse's claim of "invidious discrimination" because that record did not disclose the "entire business of the publisher corporations . . . in any detail." A.6.[1/] Without an adequate record, the court was unable to determine whether Westinghouse and the publishers actually stood in the same shoes or whether the different tax treatment reflected considerations

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1/ Such a complete description was necessary if the court were to analyze the Commissioner's decision to treat those publishers as "manufacturers." Under Massachusetts law a corporation is entitled to "manufacturing" status even if its principal activity is not manufacturing so long as "manufacturing" activities constitute a "substantial" or "material" share of the entire operations of the company. See Fernandes Super Markets, Inc. v. State Tax Commission, 371 Mass. 318, 322 (1976).

entirely unrelated to the First Amendment discrimination claimed by Westinghouse.[2/] A.6. Since the Court below declined to pass upon the question Westinghouse seeks to raise, this Court should dismiss Westinghouse's appeal. Supreme Court Rule 16.1(b); Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) (state courts should be given first opportunity to decide constitutional issues).[3/]

2/ The record below was totally limited to Westinghouse and the two publishers and contained absolutely no information on how the Commissioner treated other newspapers or broadcasters with respect to the "manufacturing" criterion. Nor did it contain any evidence about the treatment given to other, arguably analogous, parties such as magazines, cable television companies, or motion picture producers.

3/ Westinghouse seeks to avoid this result by accusing the Supreme Judicial Court of "manufacturing an ambiguity

(footnote continued)

II. MASSACHUSETTS MAY CONSTITUTIONALLY DISTINGUISH BETWEEN MANUFACTURING AND NON-MANUFACTURING CORPORATIONS FOR PURPOSES OF ITS GENERAL CORPORATE EXCISE TAX EVEN THOUGH AN INCIDENTAL CONSEQUENCE OF THAT ACTION MAY BE TO TAX NEWSPAPER PUBLISHERS DIFFERENTLY FROM RADIO AND TELEVISION STATIONS

The starting point for analysis of

(footnote continued)

about the state of the record" (Jurisdictional Statement at 13-14, n.15). This attack is unwarranted and, in any event, misses the mark. Even assuming Westinghouse were right that the state of the record below was adequate for the Supreme Judicial Court to have grappled with Westinghouse's "discrimination" claim, the plain fact is that that court did not do so. This Court normally does not sit to decide matters not decided below. See Cardinale, supra. In effect, Westinghouse is seeking to "appeal" a decision which was never made, and which therefore cannot be the subject of an appeal. In any event, if this Court should disagree with the lower court's view of the inadequacy of the record and also felt that the question Westinghouse seeks to raise must be addressed, the result would be a remand to that court with instructions to decide the case rather than for this Court to address the matter in the first instance.

the Massachusetts tax at issue is recognition that the excise tax and its use of the "manufacturing" criterion is a general tax applied by Massachusetts to all corporations doing business in the Commonwealth. It is thus distinguishable from the tax at issue in Grosjean v. American Press Co., 297 U.S. 233 (1936) which, as this Court recently noted, is ". . . distinguishable in the degree to which newspapers were singled out for special treatment." Federal Communications Commission v. National Citizens Committee, 436 U.S. 775, 801 (1978). Rather the excise is clearly one of "the ordinary forms of taxation for the support of the government" which can constitutionally be applied to the press without infringing upon the First Amendment. Grosjean, 297 U.S. supra at 250. Since "as businessman or employer, a newspaper publisher is not exempt from

laws affecting businessmen or employers generally . . .",[4] it is clear that Westinghouse, just like a newspaper publisher, "may be subjected to nondiscriminatory forms of general taxation"[5] just as it would be subject to other generally applicable regulations such as the antitrust laws.[6]

Westinghouse seeks to avoid the impact of this principle by claiming that its objection here is not to the tax itself but to the fact that the tax is "discriminatory" because, it alleges,

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4/ Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 400-01 (1973) (Stewart J. dissenting).

5/ Branzburg v. Hayes, 408 U.S. 665, 683 (1972).

6/ See Federal Communications Commission v. National Citizens Committee, 436 U.S. 775, 800 n.18 (1978); Associated Press v. United States, 326 U.S. 1 (1945).

newspapers as "manufacturers" are treated differently. But that claim is nothing more than a restatement of the truism that application of a general statute to various specific cases will necessarily produce varying results. The real issue is whether the basis for the differing treatment is proper.

Westinghouse itself has fairly stated the appropriate test for judging whether government action which results in differing treatment for different forms of the media is proper. As its Jurisdictional Statement (at 16, n. 19) states:

> Some difference in treatment of broadcast from print media is, of course, accepted where based upon material distinctions between the various forms of the media."

Similarly, as this Court recently noted:

> "We have long recognized that each medium of expression

> presents special First Amendment problems. Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 502-03. And of all forms of communication it is broadcasting that has received the most limited First Amendment protection."

Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

In its Jurisdictional Statement Westinghouse implies that the only basis for differential treatment of broacast media and print media is that the former occupy a limited electromagnetic spectrum which the latter do not. Cf. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). While that distinction is a basis for differential treatment, it is not the sole one. For example, in Pacifica Foundation, supra at 748-50, this Court identified the "uniquely pervasive presence" and unique accessibility of broadcasting as actual distinctions between

broadcasting and print media which justified content regulation - - the very core of First Amendment interests.

Another obvious example of a distinction between forms of the media held to justify differential government treatment is the substantial difference between the limited impact of newspaper reporters taking notes and the potentially massive impact of a television or motion picture crew taking pictures or video tape.[7/] The right of newspaper reporters to cover trials is now unquestioned;[8/] but many, if not most,

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7/ See Estes v. Texas, 381 U.S. 532, 544-50 (1965). Of course, modern technology has reduced the magnitude of this impact somewhat. See Chandler v. Florida, ___ U.S. ___, 49 U.S.L.W. 4141, 4145-46 (1981).

8/ Richmond Newspapers Inc. v. Virginia, ___U.S.___, 48 U.S.L.W. 5008 (1980).

jurisdictions prohibit television coverage of trials or at least place restrictions on how trials are to be covered.[9/]

Each of the above situations illustrates that the government may properly give differential treatment to various forms of the media in circumstances directly relating to content or to the media's right of access. There has never been a requirement that the government show a "compelling interest" to justify such treatment and Westinghouse offers no authority to support such a contention. Instead, as Westinghouse recognizes, it has only been necessary to show that the distinction in treatment is based on a significant and relavant distinction between the media involved. See Pacifica Foundation, supra; Estes,

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9/ See Chandler v. Florida, supra.

supra. Furthermore, as discussed above, imposition of general taxes on the media does not directly affect its First Amendment right to write or broadcast and so is clearly not as constitutionally suspect as are content or access controls. Arguably, therefore, an even more relaxed test would be appropriate here.

In this case the one key distinction between Westinghouse and the publishers is that the publishers produce and sell tangible articles (i.e. the newspapers themselves) while Westinghouse does not.[10/] Thus the publishers can properly be called "manufacturers," but,

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10/ It is presumably that difference which, in another context, has led some courts and legislatures to characterize a broadcast defamation as being slander rather than libel. See e.g. Cal. Civ. Code §§46, 48.5(4); Arno v. Stewart, 245 Cal. App. 2nd 955 (1966).

so long as the word receives its natural meaning, Westinghouse Broadcasting's radio and television activities cannot sensibly be called "manufacturing." That distinction which follows necessarily upon application of the "manufacturing" criterion is real and is relevant to the statutory purpose of encouraging development in Massachusetts of heavy industry of the "mills and factories" variety. First Data Corp v. State Tax Commission, 371 Mass. 444 (1976); Franki Foundation Co. v. State Tax Commission, 361 Mass. 614 (1972).[11/] Therefore, it justifies

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11/ In adopting the "manufacturing" criterion, the legislature may have felt that manufacturing corporations should receive preferential tax treatment because they are more valuable to the state economy, because they employ more workers, because they represent a greater share of the Commonwealth's economic base, because it feared such corporations were leaving the state (the exemption was enacted in the Great Depression) or for

(footnote continued)

different excise tax treatment.

Here the state is applying a general tax law applicable to all corporate taxpayers[12/] and the state has chosen to make the weight of that tax depend in part upon a determination whether the taxpayer is or is not engaged in manufacturing. The state's consideration of the real distinction between the products produced by newspapers and broadcasters in the course of applying that tax law, and its basing differential treatment on that fact, represents a reasoned consideration of a distinction relevant to the

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(footnote continued)

many other reasons. In any event, Westinghouse does not challenge the facial rationality of the "manufacturing" criterion as one basis for measuring corporate taxation.

12/ Compare Grosjean, supra, in which the tax was only placed on newspapers.

purpose in question. It presents far less of a First Amendment problem than do such cases as Pacifica Foundation, supra, or Estes, supra, and, a fortiori, it does not unconstitutionally impinge upon Westinghouse' First Amendment rights.[13/] Westinghouse's claim to the contrary does not present a substantial federal question and so should be dismissed. Supreme Court Rule 16.1(b).

13/ In any event, Westinghouse has made no factual showing either in this Court or in the Supreme Judicial Court that the tax in question, as a matter of fact, does operate to burden its First Amendment rights or to hamper its business operations in any way. Compare Grosjean, supra where the tax clearly would effectively operate to drive large newspapers out of business. 297 U.S. at 249-51.

CONCLUSION

For the reasons stated above, Westinghouse's appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mitchell J. Sikora, Assistant Attorney General, hereby swear that I have this day served the within Motion To Dismiss by mailing two copies postage prepaid to: Joseph L. Kociubes, Esq., Bingham, Dana & Gould, 100 Federal Street, Boston, MA 02110.

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My Commission Expires: 11/4/86

Dated: May 20, 1981